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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD HERCHEL PETERS, Defendant and Appellant.	G055800 (Super. Ct. No. 15NF1926) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Julian W. Bailey, Judge. Affirmed and remanded for resentencing.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Richard Herchel Peters was convicted of multiple counts of making criminal threats, false imprisonment, domestic battery, child abuse, and dissuading a witness. Defendant challenges his conviction for one count of dissuading a witness, and challenges several aspects of his sentence.

We affirm, and remand for resentencing. We conclude there was sufficient evidence supporting the conviction for dissuading a witness, based on the victim's testimony. As for defendant's sentence, we conclude as follows: (1) the trial court erred by imposing a full middle-term sentence on the domestic battery count; (2) the trial court did not err by sentencing defendant for both false imprisonment and making criminal threats; and (3) remand is necessary to allow the trial court to exercise its discretion whether to strike the firearm sentencing enhancements.

STATEMENT OF FACTS

Defendant lived in Anaheim with his wife, Veronica; Veronica's adult children Keila and Jessica; Jessica's infant daughter; and defendant's 10-year-old son. Defendant and Veronica had an argument the evening of July 12, 2015; Veronica told defendant they should file for divorce. The next morning, defendant and Veronica started arguing again. During their argument, defendant picked up his son and threw him into the living room.

Defendant retrieved a handgun, approached Veronica, and told her that he was going to kill her. Defendant put the gun against Veronica's neck; Veronica believed that if she argued with defendant he would kill her. The gun left a visible impression on Veronica's neck. During the incident, defendant also caused red marks and bruises on Veronica's chest and arm.

Defendant ordered Veronica to go into Keila's bedroom; Keila and defendant's son were already inside. Defendant ripped off the baby gate in the doorway and pushed Veronica into the bedroom. Defendant punched and kicked holes in Keila's

bedroom door and told them all to stay. Defendant then went to the master bedroom to get a magazine for the handgun he was holding; he loaded the gun and said he was going to kill them. Veronica was very scared and believed defendant would shoot her. Defendant said he would wait for Jessica to come home, and then he would kill all of them.

Defendant asked Keila if she had called the police, pointed the gun at her face, took her cell phone from her, checked her call history, and threw the cell phone down the hallway. Defendant pointed the gun at Keila, and she thought he was going to shoot her. She was afraid to call the police because she believed defendant would kill her and her family.

Defendant forced Veronica, Keila, and his son into the master bedroom, and again threatened to kill them. Defendant used Keila's cell phone to text Keila's father and tried to set up a lunch meeting with him, pretending to be Keila. Defendant told Veronica he was going to kill Keila's father.

Defendant then retrieved several guns and placed them on the bed in the master bedroom and began loading the guns with ammunition. One of the rifles fired and hit a dresser near where Veronica was standing. The rifle firing woke up the baby. When defendant closed the door of the master bedroom, Veronica picked up the baby, left the house with Keila and the baby, and went to the next door neighbor's house. Defendant's son remained in the house with him.

The neighbor called 911 and reported the incident. When sheriff's deputies arrived, defendant's son was outside the house; he told the deputies that defendant was inside with a gun. While the deputies were interviewing Veronica, defendant called Veronica's cell phone and spoke with a deputy for a total of 30 minutes before coming out of the house, at which time he was arrested.

PROCEDURAL HISTORY

A jury found defendant guilty of four counts of making criminal threats (Pen. Code, § 422, subd. (a) [counts 1, 6, 7, and 13]), one count of domestic battery with corporal injury (*id.*, § 273.5, subd. (a) [count 2]), three counts of false imprisonment by menace or violence (*id.*, §§ 236, 237, subd. (a) [counts 3, 4, and 5], one count of child abuse (*id.*, § 273a, subd. (a) [count 11], and one count of dissuading a witness by force or threat (*id.*, § 136.1, subd. (c)(1) [count 12]). (All further statutory references are to the Penal Code.)[1] The jury found true the sentencing enhancement allegations that defendant personally used a firearm in committing each count. (§ 12022.5, subd. (a).)

The trial court sentenced defendant to 22 years in state prison: four years on count 11 plus four years for the attendant enhancement; three years on count 2 plus four years for the enhancement, consecutive; and three years for count 12 plus four years for the enhancement, consecutive. The court imposed concurrent sentences on all other charges and enhancements. Defendant appealed.

DISCUSSION

I.

SUFFICIENCY OF THE EVIDENCE OF WITNESS DISSUASION (COUNT 12)

Defendant argues insufficient evidence supported the conviction on count 12—dissuading a witness. "To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying

[1] Defendant was also charged with three counts of kidnapping (§ 207, subd. (a)); the trial court dismissed those charges after the prosecution had presented its case-in-chief (§ 1118.1).

this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 136.1 prevents anyone from knowingly and maliciously attempting to prevent or dissuade a witness or victim of a crime from reporting the crime to law enforcement by force or an express or implied threat of force or violence. (*Id.*, subds. (b)(1) & (c)(1).) It is a specific intent crime. (*People v. Young* (2005) 34 Cal.4th 1149, 1210.)

Defendant contends that the conviction for witness dissuasion must be reversed because his threats toward Keila were directed toward learning whether Keila had already called the police, and not toward preventing her from doing so in the future. Keila testified[2] that, while pointing the gun at her, defendant took her cell phone from her and asked her if she had called the police. Keila was scared and believed defendant was going to shoot her. Keila then testified as follows:

"Q. And were you able to get your cell phone from him in order to call the police?

"A. At that time or you mean eventually?

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[2] Before trial, Keila testified at a conditional hearing pursuant to section 1335. Keila's testimony was played for the jury.

"Q. At that time.

"A. No.

"Q. And did you want to call the police?

"A. No.

"Q. You didn't want to call the police?

"A. No.

"Q. Why not?

"A. Because I was afraid that—I was afraid that he was going to kill us.

"Q. He was going to kill you?

"A. Yeah.

"Q. If you called the police?

"A. Yes.

"Q. If you did.

"A. Yeah.

"Q. If you were able to call the police, would you have called the police?

"A. Yes."

Keila also testified that she took defendant seriously when he told her, Veronica, and defendant's son, "Don't try anything or I will kill you. Don't even look out your window."

After defendant forced Veronica, Keila, and his son into the master bedroom, Keila did not feel she could leave. Defendant continued to have the gun in his hand and continued to threaten to kill them. When Keila left the room at defendant's request to get a bag, she did not look for her cell phone in the hallway (where defendant had thrown it), even though that was an opportunity call 911.

At one point, defendant left the master bedroom, but Keila did not try to escape because she "knew he would be coming back." She also did not take the opportunity to run out of the house when defendant made her and defendant's son go

back to Keila's bedroom because she did not want to take a chance of getting shot by defendant. Although Keila did eventually leave with Veronica and the baby, the crime had already been completed by that time.

The record contains substantial evidence that, while defendant's threats involved learning whether Keila had already called the police, they were also intended to and did prevent her from future attempts to call the police. Substantial evidence supports defendant's conviction on count 12.

II.

THE TRIAL COURT ERRED BY IMPOSING A FULL MIDDLE-TERM SENTENCE ON COUNT 2 (DOMESTIC BATTERY) AND THE FIREARM SENTENCING ENHANCEMENT.

Defendant argues that the trial court erred by imposing full term consecutive sentences on count 2 (domestic battery) and the attendant firearm enhancement. We review this issue de novo both because it involves the legality of a sentence (*People v. Rosbury* (1997) 15 Cal.4th 206, 209), and because it requires us to interpret and construe statutory language (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724).

At the sentencing hearing, the trial court selected count 11 (child abuse) as the base term and sentenced defendant to the middle term of four years and to four years on the attendant firearm enhancement. The court then sentenced defendant to consecutive full middle terms on count 12 (witness dissuasion), count 2 (domestic battery), and the firearm sentencing enhancements for each of those counts. Defendant argued in the trial court that the sentence on count 2 should be one-third the middle term, rather than the full middle term, under section 1170.1. The court, however, stated that section 1170.15 required it to apply the full middle term on both counts 12 and 2.

Section 1170.1 sets forth the general rule that a consecutive subordinate term should be imposed at one-third the middle term. Section 1170.15 is one of several statutes creating an exception to this rule. (See *People v. Woodworth* (2016) 245

Cal.App.4th 1473, 1478.) Section 1170.15 provides: "Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony, . . . the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury." (*Ibid.*)

The parties disagree about whether section 1170.15 applies to all other felonies charged against a defendant, or just to certain felonies. In interpreting a statute, we look first to the words of the statute, giving them their usual and ordinary meaning, and construing them in the context of the statutory scheme. (*People v. Johnson* (2015) 61 Cal.4th 674, 682.) The words of section 1170.15 are clear and unambiguous: (1) if defendant is convicted of a felony and (2) is also convicted of violating section 136.1 against a witness to the first felony, and (3) the trial court decides to impose a consecutive sentence on the "felony described in this section," then (4) the full middle term sentence shall be imposed on the "felony described in this section" and the specified sentencing enhancements attendant to that felony conviction. (See *People v. Woodworth*, *supra*, 245 Cal.App.4th at pp. 1478-1479.) The felonies "described" in the statute are those that prohibit dissuading witnesses, influencing or inducing testimony, and soliciting the commission of a crime, including but not limited to section 136.1. The language of the statute therefore requires the trial court to impose a full, consecutive, middle term sentence for those specified felonies; other felony convictions are subject to the regular rule of section 1170.1.

Comparing the language of section 1170.15 to that of section 1170.13 is instructive. Section 1170.13 provides as follows: "Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted pursuant to subdivision (b) of Section 139, *the subordinate term for each consecutive offense shall consist of the full middle term*." (Italics added.) While the two statutes were originally enacted at different times, they were twice amended at the same time as part of sentencing legislation. (See Stats. 1998, ch. 926, §§ 3, 4; Stats. 1997, ch. 750, §§ 5, 6.) Having twice amended these statutes at the same time, and having left one with language regarding "each consecutive offense" and the other with language regarding "each consecutive offense that is a felony described in this section" we must conclude these phrases have different meanings.

In this case, once the trial court exercised its discretion to make the sentence for the conviction for dissuading a witness (§ 136.1, subd. (c)(1)) (count 12) a consecutive sentence, it was required to impose the full middle term on that count and the attendant firearm enhancement. The sentences on other felony counts, including count 2 for domestic battery, however, were subject to section 1170.1. The trial court erred by imposing a consecutive, full middle-term sentence on count 2 and its attendant firearm enhancement.

III.

THE TRIAL COURT DID NOT ERR BY SENTENCING DEFENDANT FOR BOTH FALSE IMPRISONMENT AND MAKING CRIMINAL THREATS.

Defendant was sentenced to concurrent terms on four counts of making criminal threats (counts 1, 6, 7, and 13), and three counts of false imprisonment (counts 3, 4, and 5). Defendant argues on appeal that the trial court erred by failing to stay execution of his sentences on counts 3, 4, and 5, pursuant to section 654 because the acts of false imprisonment occurred during the commission of the criminal threats, and were

incidental to them. "The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

"Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

To convict defendant of false imprisonment, the jury necessarily found: (1) defendant intentionally restrained, confined, or detained someone by violence or menace, and (2) defendant made that person stay somewhere against the person's will. (§ 237.) To convict defendant of making criminal threats, the jury necessarily found: (1) defendant willfully threatened to commit a crime that would result in death or great bodily injury; (2) defendant made the threat with the specific intent that it would be taken as a threat; (3) the threat was so unequivocal, unconditional, immediate and specific that it conveyed to the person threatened a gravity of purpose and immediate prospect of execution; (4) the person threatened was in actual fear of their own or their family's

safety; and (5) that fear was reasonable under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Defendant argues "the evidence to support the convictions for criminal threats, that appellant 'willfully threatened to commit a crime which will result in death or great bodily injury to another person, and that the defendant made the threat with the specific intent that the statement is to be taken as a threat,' is the very same evidence used to establish that he 'intentionally restrained, confined, or detained someone or caused that person to be restrained, confined, or detained by violence or menace, . . . [by] a verbal or physical threat of harm, including the use of a deadly weapon.'"

The Attorney General argues that the trial court did not err in declining to stay any sentences under section 654 because defendant's "conduct during the incident was in the extreme. Since the conduct which formed the basis of the criminal threats far exceeded what was necessary to falsely imprison the victims, substantial evidence supported the trial court's finding that [defendant] harbored separate intent with respect to the separate crimes."

In *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272, the court concluded that the defendant committed the crimes of robbery and attempted murder with divisible intents. "While it is true that attempted murder can, under some circumstances, constitute the 'force' necessary to commit a robbery, here, it was not the necessary force." (*Id.* at p. 272.)

"[A]t some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime. We should not lose sight of the purpose underlying section 654, which is 'to insure that a defendant's punishment will be commensurate with his culpability.'" (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.)

Defendant's threats of violence to his family members went far beyond what was necessary to accomplish the crime of false imprisonment. Defendant repeatedly threatened to kill all the victims, and repeatedly pointed a gun at them. None of the victims provided any resistance to defendant or gave any thought to attempting to escape. All the victims believed that defendant would, in fact, kill them. Defendant checked Keila's call history on her cell phone to ensure she had not called the police, and then threw the cell phone down the hallway to prevent her from doing so. Keila was so frightened by defendant's threats that she neither tried to collect her cell phone nor tried to escape. Defendant later used Keila's cell phone to text her father to arrange a meeting, at which defendant stated he would kill Keila's father. Finally, defendant began retrieving and loading multiple guns.[3]

Based on this record, we conclude that defendant's intent and objectives in committing the crimes of false imprisonment and making criminal threats were different. Therefore, the court did not err in failing to stay execution of defendant's sentences.

IV.

THE MATTER MUST BE REMANDED UNDER SENATE BILL NO. 620.

The trial court imposed firearm sentencing enhancements under section 12022.5, subdivision (a) on all counts. Defendant argues that the matter should be remanded to allow the trial court the opportunity to exercise its discretion to strike the firearm allegations; the Attorney General concedes that defendant's argument has merit. We agree.

Before the enactment of Senate Bill No. 620, trial courts were prohibited from striking firearm enhancements under section 12022.5, subdivision (c). That subdivision now reads, in relevant part: "The court may, in the interest of justice

[3] As note *ante*, after one of defendant's guns discharged, Veronica left the house with Keila and the baby. The crimes of both false imprisonment and making criminal threats had both been completed long before that moment.

pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." This change in sentencing law applies retroactively to defendant's case. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712.)

Some courts have held that remand for resentencing is not necessary if the trial court previously indicated it would not have struck the firearm enhancement. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, the trial court initially indicated it intended to strike the firearm enhancement on one count, but was advised it could not do so until Senate Bill No. 620 became effective. It is therefore appropriate that we remand the matter to allow the trial court the opportunity to exercise its discretion regarding the striking of any firearm enhancements.

DISPOSITION

We affirm the judgment of conviction and remand for resentencing. Defendant's sentence on all felonies other than count 12 (witness dissuasion) (imposed pursuant to section 1170.15) and their attendant sentencing enhancements shall be imposed pursuant to section 1170.1. The trial court shall have the opportunity to exercise its discretion regarding the striking of any firearm sentencing enhancements.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.